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In the Supreme Court of the United States

OCTOBER TERM, 1976

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

HELEN DE CASTRO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 1a–18a) is reported at 403 F. Supp. 23.

JURISDICTION

The judgment of the three-judge district court declaring a portion of 42 U.S.C. 402 unconstitutional was entered on September 30, 1975 (J.S. App. B, pp. 19a–20a). A notice of appeal to this Court was filed on October 24, 1975 (J.S. App. C, pp. 21a–22a). On December 12, 1975, the time for docketing the appeal was extended by Mr. Justice Rehnquist to January

22, 1976; on January 8, 1976, Mr. Justice Stevens further extended the time for docketing the appeal to and including February 21, 1976. The jurisdictional statement was filed on February 20, 1976, and probable jurisdiction was noted on May 3, 1976 (App. 9). The jurisdiction of this Court is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi,* 422 U.S. 749, 763 n. 8; cf. *McLucas* v. *DeChamplain,* 421 U.S. 21, 31–32.

QUESTION PRESENTED

Whether Congress is constitutionally required to make wife's insurance benefits available to the unremarried divorced wife of a retired or disabled wage-earner on the same basis as if she had remained married to the wage-earner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

The relevant provisions of Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. (and Supp. IV) 401 *et seq.,* are set forth at J.S. App. D, pp. 23a–25a.

STATEMENT

1. Under Section 202(b)(1)(B) of the Social Security Act, 42 U.S.C. 402(b)(1)(B), the "wife" or "divorced wife" of an individual entitled to old-age or disability insurance benefits is eligible for wife's insurance benefits if, *inter alia,* such wife or divorced

wife has "attained age 62 or (in the case of a wife) has in her care * * * a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual." The term "wife" is defined in Section 216(b) of the Act, 42 U.S.C. (Supp. IV) 416(b), as "the wife of an individual, but only if she (1) is the mother of his son or daughter, [or] (2) was married to him for a period of not less than one year immediately preceding the day on which her application is filed * * *." Section 216(d)(1) of the Act defines the term "divorced wife" as "a woman divorced from an individual, but only if she had been married to such individual for a period of 20 years immediately before the date the divorce became effective." Thus, whereas the wife of an individual entitled to old-age or disability insurance benefits, who has in her care a child entitled to child's insurance benefits on the basis of her husband's Social Security account, is herself entitled to wife's insurance benefits without regard either to her age or the duration of her marriage to the wage-earner,[1] an otherwise similarly situated divorced wife of the wage-earner is entitled to wife's insurance benefits only if she has attained age 62 and, prior to her divorce, had been married to the wage-earner for at least 20 years.[2] This case involves the

[1] But if the wife is not the mother of the entitled child in her care, to be eligible the wife is required by Section 216(b) of the Act to have been married to the wage-earner for at least a year before her application is filed.

[2] The other conditions on eligibility for wife's insurance benefits are set forth in Section 202(b)(1)(A), (C), and (D) of the

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constitutionality of the first of these two differences in the treatment of wives and divorced wives, *i.e.*, the validity of the age condition placed on the eligibility of divorced wives, with entitled children in their care, to receive wife's insurance benefits.

2. On September 23, 1971, appellee Helen de Castro, who was then age 56, applied for wife's insurance benefits on the basis of the Social Security account of her divorced husband, Albert de Castro, who had earlier become entitled to old-age insurance benefits (App. 15, 34–37, 51–54). Appellee and Mr. de Castro had been divorced in February 1968, after more than 20 years of marriage (App. 20); appellee was not awarded alimony in the divorce decree (App. 20). At the time she filed the application for wife's benefits, appellee had their 22 year-old daughter in her care; the daughter, who was disabled, was entitled to child's insurance benefits on the basis of Mr. de Castro's Social Security account (App. 44–47, 49–50).[3]

The application was denied initially because appellee had not attained age 62 (App. 55, 57–58). However, the initial determination was reversed after a

Act, 42 U.S.C. (and Supp. IV) 402(b)(1)(A), (C), and (D). In particular, to be eligible, a divorced wife cannot be remarried, nor can either a wife or a divorced wife be entitled to old-age or disability insurance based on a primary insurance amount which is one-half or more of the primary insurance amount of the wage-earner on whose Social Security account the claim for wife's benefits is based.

[3] In 1971, the daughter was receiving $79.60 per month in child's insurance benefits (App. 50). In addition, at the time of divorce the state court ordered Mr. de Castro to pay $35 a week for child support (App. 20), but it appears that he did not make these payments (App. 20).

hearing, and appellee was determined by an administrative law judge to be eligible for benefits (App. 13–33).[4] Thereafter, on its own motion, the Appeals Council reviewed and reversed the administrative law judge's decision (App. 9–13). The Appeals Council concluded that the claimant was not entitled to benefits because she had not attained age 62 and Section 202(b)(1)(B) does not allow the payment of wife's insurance benefits to a divorced wife under 62 years of age (App. 12–13). The Appeals Council's decision became the final decision of the Secretary of Health, Education, and Welfare (J.S. App. A, p. 4a).

Appellee then commenced this suit under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), seeking (1) a declaratory order that Section 202(b)(1)(B) of the Act unconstitutionally discriminates against divorced wives by precluding them from receiving wife's insurance benefits under any circumstances before they attain age 62, while allowing such benefits to be paid without regard to age to wives who have a qualified child in their care, and (2) injunctive relief against enforcement of the statute in a way that denied her wife's insurance benefits (App. 1–4).

A three-judge district court was convened under 28 U.S.C. 2282 (App. 6). The court granted the declaratory and injunctive relief sought by appellee, holding that there is "no rational justification * * * for dis-

[4] The administrative law judge's decision granting appellee benefits was based on his mistaken construction of Section 202(b)(1)(B) as allowing the payment of benefits to a divorced wife under 62 years of age with a qualified child in her care (App. 31).

tinguishing between married wives and [similarly situated] divorced wives * * *" (J.S. App. A, p. 12a).

SUMMARY OF ARGUMENT

The issue presented by this case is whether Congress violated the Due Process Clause of the Fifth Amendment by granting secondary insurance benefits under the Social Security Act to wives under age 62 who have an entitled child in their care, on the basis of their husband's eligibility as a primary beneficiary to receive old-age or disability insurance benefits, while not extending such benefits to otherwise similarly situated divorced wives. As in other cases involving the constitutional adjudication of a statutory classification under the Social Security Act, this case, in essence, calls into question the power of Congress to allocate insurance benefits in the manner it has chosen.

The Due Process Clause bars Congress only from making allocations that are "'patently arbitrary * * *, utterly lacking in rational justification.'" *Weinberger* v. *Salfi,* 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor,* 363 U.S. 603, 611. Tested by that standard, Congress' allocation of secondary benefits under consideration here is constitutional. The present statutory provisions governing the payment of such benefits to wives and divorced wives are the product of separate legislative decisions made over the life of the Social Security Act, each of which has extended secondary benefits to a category of wife or divorced wife not previously protected. Congress simply has not identified the class represented by appellee—

younger divorced wives with entitled children in their care—as sufficiently in need to require special assistance. Each successive enlargement of the class of wives and divorced wives eligible to receive secondary insurance benefits on the basis of their husbands' or former husbands' Social Security accounts has been bottomed on a particular rationale that did not equally embrace the class of divorced wives represented by appellee.

In general, the payment of benefits to wives of deceased, disabled, or retired wage-earners is designed to ameliorate the economic and social impact on the family normally entailed by the loss of the wage-earner's income. This core rationale for providing secondary benefits to the wage-earner's family does not apply to divorced wives, whose economic, legal, and social relationship with their former husbands is pervasively changed by the divorce. Whereas wives are likely to be dependent for support on their husbands, most divorced wives receive no support from their former spouses. The economic need of these divorced wives is therefore unaffected by the wage-earner's disability or retirement. Since Social Security is essentially an income replacement system, it was reasonable for Congress to provide benefits to wives on the occasion of the wage-earner's retirement or disability, and not to provide such benefits to divorced wives, whose economic fortunes usually have been severed by the divorce from those of the wage-earner.

Congress has determined it is appropriate to provide secondary benefits to certain surviving divorced wives and elderly divorced wives. Although these categories of individuals fall outside the core rationale for providing secondary benefits, Congress has evidenced a special concern for them. Congress historically has recognized the problems associated with widowhood, and it reasonably could perceive that surviving divorced wives are embraced by that rationale. Moreover, in extending coverage to elderly divorced wives, Congress has sought to provide what is, in essence, a retirement benefit to a group of individuals who are not eligible for old-age insurance on their own account because of their long years as a homemaker. But neither special rationale for providing benefits to these classes of divorced wives extends to the class of divorced wives represented by appellee.

ARGUMENT

CONGRESS IS NOT CONSTITUTIONALLY REQUIRED TO MAKE WIFE'S INSURANCE BENEFITS AVAILABLE TO THE UNREMARRIED DIVORCED WIFE OF A RETIRED OR DISABLED WAGE-EARNER ON THE SAME BASIS AS IF SHE HAD REMAINED MARRIED TO THE WAGE-EARNER

INTRODUCTION

Payment of benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, is based upon the wage-earner's record of earnings in employment or self-employment covered by the Act. Old-age and disability insurance benefits (primary benefits) are payable to the wage-earner, and several other categories of benefits (secondary benefits) are payable to other individuals on the basis of their relationship to the wage-earner. See *Flemming* v. *Nestor,* 363 U.S. 603, 608. Secondary benefits at present are payable under specified conditions to the wife or divorced wife, child, widow or surviving divorced wife, and parent of a retired, deceased, or disabled male wage-earner. See Sections 202(b), (d), (e), (g), and (h) of the Act, 42 U.S.C. (and Supp. IV) 402(b), (d), (e), (g), and (h). The issue presented by this case is whether Congress violated the principle of equal protection inherent in the Due Process Clause of the Fifth Amendment by granting secondary insurance benefits to wives under age 62 who have an entitled child in their care while denying such benefits to otherwise similarly situated divorced wives. Underlying this narrow issue is the broader question of the extent of Congress' power to choose among competing claimants for scarce social welfare funds.

The Social Security Act "was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify." *Flemming* v. *Nestor,*

supra, 363 U.S. at 610. No fixed system of social insurance would be adequate to meet the demands of ever changing social conditions; amendments and modifications must be made from time to time to readjust the system in light of new conditions and reordered priorities. At the same time, the practical realities of the legislative process foreclose a comprehensive revision of the Act each time an additional category of potential beneficiaries is identified as deserving of assistance. Congress is constrained to act in piecemeal fashion.

This Court has in the past evinced an understanding of and sympathy for the step-by-step legislative process that gives shape and content to an evolving social welfare scheme, by acknowledging that a legislature is constitutionally empowered to deal with a problem "one step at a time" and to "select one phase of one field and apply a remedy there, neglecting the others." *Jefferson* v. *Hackney,* 406 U.S. 535, 546; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489.[5] This approach properly recognizes that the Constitution is a practical instrument of government and that Congress must be allowed flexibility in fashioning a system of social insurance designed to allocate necessarily limited fiscal resources for the relief of competing, diverse, and changing social needs.

[5] The district court below found this approach inapposite on the ground that "[t]he difference between classifications involving regulation of businesses and those affecting human needs is obvious" (J.S. App. A, p. 12a). In so ruling, the district court acted in contradiction to this Court's explicit teaching, in *Weinberger* v. *Salfi*, 422 U.S. 749, 774, that: "If the Fifth and Fourteenth Amendments permit this latitude to legislative decisions regulating the private sector of the economy, they surely allow no less latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury." See also *Geduldig* v. *Aiello*, 417 U.S. 484, 495; *Dandridge* v. *Williams*, 397 U.S. 471, 486–487.

The importance of such flexibility is especially apparent with regard to the allocation of secondary social insurance benefits, *i.e.,* benefits paid to an individual other than the wage-earner on the basis of that individual's relationship to the wage-earner. As the nation has developed economically, and as prevailing views have shifted with respect to the extent of the government's responsibility for the individual's economic well-being, Congress has gradually but steadily added to the categories of eligible beneficiaries. In thus responding to changing social conditions by enlarging the coverage of the Social Security Act, Congress has acted in the time-honored tradition of legislative reform by moving one step at a time to address "the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 489.

In particular, the present statutory provisions governing the payment of secondary benefits to the wives and divorced wives of covered wage-earners are the product of a series of separate legislative decisions made over the life of the Social Security Act. When the Social Security Act was first enacted, neither wives nor divorced wives were eligible for secondary benefits. 49 Stat. 622. As we demonstrate below, each

subsequent legislative decision to extend secondary benefits to a previously unprotected category of wives or divorced wives had a rationale that did not embrace the particular category of divorced wives represented by appellee. Accordingly, the denial of such benefits to that category of divorced wives is rational, whether or not any single overarching rationale fully explains the relations of all the resulting statutory classifications to one another. The lines presently drawn represent the " 'rough accommodation' " required by " '[t]he problems of government.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485.

In a case such as this, due process demands no more. The district court correctly determined (J.S. App. A, pp. 3a–7a), and appellee now apparently concedes (Mot. to Aff. 5–6), that since the classification challenged here is not "suspect" and does not bear upon a fundamental constitutional interest, "[i]f the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." *Richardson* v. *Belcher,* 404 U.S. 78, 84. As this Court reaffirmed in *Weinberger* v. *Salfi,* 422 U.S. 749, 768, ordinary social welfare classifications, such as the one challenged here, satisfy the requirements of equal protection and due process unless " 'the statute * * * [is] utterly lacking in rational justification.' " The statutory classification at issue here is constitutional under that test.

A. THE RATIONALE UNDERLYING CONGRESS' EXTENSIONS OF SECONDARY INSURANCE BENEFITS TO WIVES DOES NOT EQUALLY EMBRACE DIVORCED WIVES

1. Benefits have been extended to wives in order to ameliorate the impact on the family unit of the retirement, disability, or death of the wage-earner

As originally enacted in 1935, the Social Security Act provided only for the payment of primary benefits to the elderly, retired wage-earner. 49 Stat. 622. In 1939, however, Congress established secondary insurance benefits as a means of providing additional protection to the wage-earner and his immediate family. The principal purpose of the 1939 amendments was "to afford more adequate protection to the family as a unit." H.R. Rep. No. 728, 76th Cong., 1st Sess. 7; S. Rep. No. 734, 76th Cong., 1st Sess. 7. Accordingly, secondary benefits were made available, under specified conditions, to members of the wage-earner's family—wives, children, widows, orphans, and surviving dependent parents—on the basis of the wage-earner's Social Security account. 53 Stat. 1363–1366.

The restriction of eligibility for secondary benefits to members of the family was consistent with the governing principle that "[u]nder a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiaries * * *." H.R. Rep. No. 728, *supra,* at 7. Congress acted on the reasonable premises that the members of a wage-earner's family are more likely than individuals outside the family circle to be dependent on his income for their economic well-being and that it was the family as a unit, and the members of that

family, that suffered most from a reduction in family income. Secondary insurance benefits were therefore extended to such individuals in order to ameliorate the impact on the family of the loss of or reduction in income that occurs upon the death or retirement of the wage-earner. Cf. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 644. Since individuals outside the family unit were less likely to be dependent upon the wage-earner, and therefore less likely to experience a direct reduction in economic well-being upon his death or retirement, and because administrative and program costs would be significantly increased by attempting to cover actual dependents outside the family unit, the benefits were restricted to family members. See Final Report of the Advisory Council on Social Security 15 (1938) (the "1938 Report"). Moreover, Congress was aware that making benefits available to family members would conduce to the wage-earner's own economic well-being during his lifetime; the same result would not necessarily follow from extending benefits to individuals outside the family.

Thus, the 1939 amendments granted secondary benefits to the wife of a retired wage-earner when she reached 65 years of age. Section 201 of the Social Security Act Amendments of 1939, 53 Stat. 1364, as amended, 42 U.S.C. (and Supp. IV) 402(b). Congress recognized that the retired wage-earner's primary benefit alone was likely to be insufficient to support the family unit, because "the probable need of a married couple is greater than that of a single individual."

H.R. Rep. No. 728, *supra*, at 11. Congress therefore determined that payment of secondary benefits to wives who were not entitled to substantial benefits on the basis of their own earnings[6] was an appropriate means of supplementing family income.

The 1939 amendments also provided for the payment of secondary benefits to widows, orphans, and dependent children of deceased wage-earners. 53 Stat. 1364–1366. Specifically, a widow became entitled to survivor's benefits at age 65, or regardless of age if she had in her care a child of the wage-earner who was entitled to benefits on the basis of the wage-earner's Social Security account. 53 Stat. 1365, as amended, 42 U.S.C. (and Supp. IV) 202(e) and (g).[7]

In providing for survivor's benefits, Congress recognized that the death of the wage-earner has a substantial impact on the economic security of his family. See H.R. Rep. No. 728, *supra*, at 7; 1938 Report, *supra*, at 16–18; Report of the Committee on Economic Security, H.R. Doc. No. 110, 76th Cong., 1st Sess. 7–8 (1939). The death of the wage-earner often would leave the aged widow, who was unlikely to have sufficient work credit to

[6] A wife of retirement age who was entitled to receive a primary insurance benefit equal to or greater than one-half of the primary insurance benefit of her husband was made ineligible to receive wife's insurance benefits. 53 Stat. 1364.

[7] The benefit provision for a widow under retirement age with an entitled child in her care was entitled "Widow's Current Insurance Benefits." 53 Stat. 1365. In 1950, this subsection was transferred to Section 202(g) of the Act and retitled "Mother's Insurance Benefits." 64 Stat. 485–486.

receive substantial old-age insurance benefits on the basis of her own Social Security account, without sufficient financial support in her declining years. Congress presumably deemed it unlikely that such women could, and undesirable that they should be required to, join or return to the work force at an advanced age. See also pp. 16–23 of the government's brief in *Mathews* v. *Goldfarb,* No. 75–699, probable jurisdiction noted February 23, 1976.[8] Moreover, by assuring that the wage-earner's widow would be provided support after the wage-earner's death, Congress reduced the pressure that the wage-earner and his family would otherwise be under to attempt to make provision for the future out of his own earnings or limited primary benefits during his lifetime. Thus the provision of survivor's benefits for widows operated to enhance the well-being of the wage-earner as well.

The benefits program for widows (regardless of age) with entitled children in their care had a similar remedial purpose. Congress intended to prevent such widows from being forced into the job market by giving them the option of remaining at home to care for the dependent child. 1938 Report, *supra,* at 18, 31; see *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. 648–650.

The eligibility provisions for wives and widows remained unchanged from 1939 until 1950. In the latter year, Congress extended secondary benefits to the wives of wage-earners entitled to old-age benefits who

[8] A copy of the government's brief in *Goldfarb* is being furnished to appellee's counsel.

had entitled children in their care; such benefits were made payable regardless of age. Section 101(a) of the Social Security Act Amendments of 1950, 64 Stat. 483, as amended, 42 U.S.C. (and Supp. IV) 402(b). In enacting this provision, Congress extended to wives of retired wage-earners the same protection that had been afforded in 1939 to widows. Congress' purpose in extending such benefits to wives, however, was not, as it was in the case of widows with entitled children in their care, "to provide children deprived of one parent with the opportunity for the personal attention of the other * * *." *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 648–649. The wage-earner's retirement, unlike his death, does not confront the wife with the choice of foregoing income or leaving the child unattended; the wage-earner himself would be able to care for the child if his wife takes a job. But such a forced alteration in the parents' normal roles could be anticipated to be disruptive. By providing supplementary benefits that would enable a mother to maintain her normal role in the family, Congress reduced the need for such a readjustment in the family situation late in the wage-earner's life.

In 1958, Congress further broadened the protection afforded families by providing benefits to the dependents of disabled wage-earners, including wives with entitled children in their care. Section 205(b)(1) of the Social Security Amendments of 1958, 72 Stat. 1021–1023, as amended, 42 U.S.C. (and Supp. IV) 402(b), (c), (d), (e), (f), and (g). The children of a disabled wage-earner are normally younger than

those of a wage-earner who retires, and thus the desirability of permitting the mother to maintain her normal role in the family is correspondingly greater, especially since the disabled husband may be unable to care for the children himself. See H.R. Rep. No. 2288, 85th Cong., 2d Sess. 12–13 (1958). Congress further believed that the wife often would be needed at home to care for her disabled husband (*id.* at 13):

> It is reasonable to assume, also, that in a great many cases the care which the disabled person requires makes it difficult, if not impossible, for his wife to increase the family income by working.

2. It was rational for Congress to treat divorced wives, who are no longer members of the wage-earner's immediate family, differently from wives

Although some secondary benefits have now been extended to divorced wives (see pp. 24–27, *infra*), Congress consistently has distinguished between wives and divorced wives in the Social Security Act and provided somewhat differently for them. In the statutory provision at issue in this case, Congress has granted to wives with entitled children in their care, and denied to similarly situated divorced wives, the right, without regard to age, to receive secondary benefits when the wage-earner becomes entitled to old-age or disability insurance benefits. As we now show, Congress acted rationally both in distinguishing generally between wives and divorced wives and in establishing the particular classification challenged here.

a. Divorce works fundamental and pervasive changes in the emotional, social, legal and economic

relationships between former spouses.[9] It causes a disintegration of the "family as a unit" that secondary benefits were principally designed to protect. The distinctions drawn by Congress between wives and divorced wives realistically reflect those facts.

Secondary benefits are paid to categories of individuals defined on the basis of probable need arising out of the termination of the wage-earner's employment; they are designed in large part to replace the support lost by dependents as a consequence of the death, disability, or retirement of the wage-earner. In assessing the existence of such need, and in allocating benefits on the basis of that assessment, Congress is entitled to make distinctions based upon the relative likelihood of dependency. *Mathews* v. *Lucas*, No. 75–88, decided June 29, 1976. Congress correctly determined that wives are substantially more likely than divorced wives to be dependent upon the wage-earner for economic support and thereby to suffer from the reduction in the wage-earner's income.

A sizable majority of married women are dependent upon their husbands for economic support. In 1950, less than one-fourth of all married women in the United States were gainfully employed. *Bureau of the Census, A Statistical Portrait of Women in the U.S.*, table 7–4 (1976). Even now, less than one-half of married women hold jobs. *Ibid.* Those who do work contribute, on the average, only approximately one-fourth of the family income. *Id.* at table 10–10. Ac-

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[9] Section 216(d)(4) of the Act, 42 U.S.C. 416(d)(4), defines divorce as "divorce a vinculo matrimonii," *i.e.*, divorce that works a complete dissolution of the marriage relationship.

cordingly, Congress rationally concluded that a wife, whether or not employed, would be likely to experience a loss of support upon the termination of her husband's employment.

In contrast, few divorced women receive support from their former husbands. The National Commission on the Observance of International Women's Year has reported that "[a] September 1975 survey [of American women] conducted for the Commission * * * revealed that only 14 percent of divorced women were awarded alimony and of this 14 percent only 46 percent [*i.e.*, about 6.5 percent of all divorced women] were collecting regularly." ". . . . *To Form a More Perfect Union . . .*", Report of the National Commission on the Observance of International Women's Year 16 (1976). A much earlier study conducted by the Bureau of the Census similarly concluded that only 14.7 percent of divorced women had been granted alimony. *Bureau of the Census, Marriage and Divorce* 30 (1925).[10]

Congress could therefore reasonably conclude that divorced wives, as a class, were considerably less likely than wives to be affected by termination of the wage-earner's employment due to death, disability, or retirement. Indeed, where, as here and as in the great majority of cases, the divorced wife has not been granted

[10] We are not aware of any other comprehensive studies on the subject. The National Commission has called for governmental collection of data on divorce, alimony, and related matters. *Report*, *supra*, at 233–235.

alimony, she is likely to be wholly unaffected economically by her former husband's exit from the job market. Like many other individuals not covered by a Social Security benefit program, such a divorced wife may be needy, but her need is unrelated to the termination of the wage-earner's employment. Moreover, payment of benefits to her, unlike payments to wives and widows, would not directly or indirectly assist the wage-earner, from whose economic fortunes she has been severed.[11] Accordingly, Congress had a rational basis for distinguishing between wives and divorced wives for the purpose of allocating secondary dependency benefits designed to provide additional protection to the wage-earner and his immediate family.

b. The statutory classification challenged here is supported by the rational basis that underlies the general distinction between wives and divorced wives, and by other considerations as well.

[11] In those relatively few cases in which a support obligation has been imposed under state law, the domestic relations court may or may not deem it appropriate to adjust the obligation upon the former husband's disability or retirement. Thus even as to those divorced wives who receive support, it cannot be said with certainty that they will suffer a loss of support when the wage-earner becomes disabled or retires. In view of the relatively small number of divorced women likely to lose support, Congress could, in order to limit the proliferation of statutory classifications that must be administered under the Social Security Act, rationally treat all otherwise similarly situated divorced women alike. In any event, that treatment in no way disadvantages appellee, who is not entitled to support from, or dependent upon, her former husband.

A wife with an entitled child in her care is very likely to suffer at least some loss of support when her husband becomes disabled or retires. Payment to her of secondary benefits ameliorates that economic loss and, by increasing the family income, assists the wage-earner as well. Payment of similar benefits to a divorced wife with an entitled child in her care would not serve either of these purposes. Where, as in most cases, the divorced wife is not receiving support from her former husband, she suffers no economic loss upon the termination of his employment that requires amelioration. Similarly, since the divorced wife is physically, economically, and legally removed from the wage-earner's immediate family and surroundings, payment of benefits to the divorced wife ordinarily would be of no assistance to the wage-earner whose income has been reduced.

Moreover, the payment of benefits to the wife serves to minimize the extent to which the family's normal routine must be disrupted by the wage-earner's termination of employment: if the wife had remained at home in the past to care for the child, the availability of benefits enables her, if she so desires, to continue her child-care activities without being forced into the job market. This consideration may be especially important in cases of disability, where the disabled wage-earner may not be able to provide child care and, indeed, may be in need of care himself.

In contrast, the disability or retirement of the wage-earner is not likely to have any disruptive effect on the economic or personal life of the divorced wife: she

is not thereby forced out into the job market to supplement a declining family income,[12] nor is there a heightened need for her to remain at home because of the presence there of the disabled or elderly wage-earner. In this case, for example, Mr. de Castro's retirement had no impact whatsoever upon appellee's economic or personal life. It therefore provided no occasion for an increase in the amount of Social Security benefits already paid for the support of her family.[13]

These differences in the circumstances of wives and divorced wives amply justify the line Congress has drawn between them in allocating secondary benefits.

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[12] There may be a small percentage of divorced women with entitled children in their care whose alimony is reduced at the time their former husbands become disabled or retire and who therefore might seek employment at that point. See note 11, *supra*. But the postponement of their secondary benefits until they reach age 62 simply places them in a position similar to, but somewhat better than, that of dependent parents, who receive secondary benefits only at the death of the wage-earner, not at the time of his disability or retirement, and then only when they have reached age 62. Section 202(h) of the Act, 42 U.S.C. 402(h). The comparison of divorced wives with dependent parents seems more apt than that with wives. Members of the immediate family—wives and minor children—are within the core rationale of affording "more adequate protection for the family as a unit." H.R. Rep. No. 728, *supra*, at 7. Other relatives, such as dependent parents and divorced wives, are outside that core rationale and for that reason have been granted somewhat less comprehensive benefits.

[13] By definition, appellee's family (consisting of herself and her daughter) and those of other divorced women with entitled children in their care already receive Social Security benefits on account of the children. See Section 202(d) of the Act, 42 U.S.C. (Supp. IV) 402(d).

B. THE RATIONALES UNDERLYING CONGRESS' EXTENSIONS OF SECONDARY INSURANCE BENEFITS TO CERTAIN OTHER DIVORCED WIVES DOES NOT SUPPORT THE GRANT OF BENEFITS TO YOUNGER DIVORCED WIVES WITH ENTITLED CHILDREN IN THEIR CARE

Over time, Congress has extended secondary insurance benefits to certain categories of divorced wives. As a result of a series of amendments to the Social Security Act, surviving divorced wives[14] are now treated in the same manner as widows. See Section 202(e) and (g) of the Act, 42 U.S.C. (and Supp. IV) 402(e) and (g).[15] This comparability of treatment furthers evident humanitarian purposes. In originally establishing widow's benefits, Congress recognized that widows as a class are among the neediest individuals in our society. See H.R. Rep. No. 728, *supra,* at 11. As has been recently observed (Women and Social Security: Adapting to a New Era, a Working Paper prepared by the Task Force on Women and Social

[14] The Act defines "surviving divorced wife" as "a woman divorced from an individual who has died, but only if she had been married to the individual for a period of 20 years immediately before the date the divorce became effective." Section 216(d)(2) of the Act, 42 U.S.C. 416(d)(2).

[15] Mother's benefits were granted to dependent surviving divorced wives in 1950. Sections 101(a) and 104(a) of the Social Security Act Amendments of 1950, 64 Stat. 485–486, 511. The dependency requirement was eliminated in 1972. Section 114 of the Social Security Amendments of 1972, 86 Stat. 1348. In 1965, surviving divorced wives were granted widow's insurance benefits. Section 308(a) of the Social Security Amendments of 1965, 79 Stat. 375. Mother's benefits, unlike wife's and widow's benefits, are made available to divorced women without regard to the length of their marriages to the wage-earner. See Section 216(d)(3) of the Act.

Security for the Senate Special Committee on Aging, 94th Cong., 1st Sess. 42 (1975)):

> As a group, aged widows have traditionally been the most economically deprived of the segments of the aged population. Older women living alone, the overwhelming proportion of whom are widows, had median incomes of $2,642 in 1973 when 33.4 percent of them lived below the poverty level.

Congress reasonably concluded that the economic circumstances of surviving divorced wives were likely to be no better than those of widows and that the payment to them of secondary benefits would succor members of a group "whose probable need is greatest." H.R. Rep. No. 728, *supra,* at 11. That conclusion did not equally apply to divorced women, such as appellee, whose husbands are still living. Such women are, on the average, younger than widows, and therefore more likely to be able to obtain gainful employment. Moreover, the death of the wage-earner, unlike his disability or retirement, ordinarily would definitively terminate any possibility that the divorced wife might otherwise have had of receiving support from her former husband. Cf. Annotation, 39 A.L.R. 2d 1406, 1408–1411 (1955).

In 1965, Congress acted to meet the needs of older divorced women by granting them benefits, at or after age 62, when their former husbands became entitled to old-age or disability benefits. Congress recognized that it was "not uncommon for a marriage to end in divorce

after many years when the wife is too old to build up a substantial social security earnings record even if she can find a job." H.R. Rep. No. 213, 89th Cong., 1st Sess. 93 (1965). To remedy this specific situation, Congress amended Section 202(b) of the Act to allow those older divorced women, most of whom would not otherwise have been eligible for any Social Security benefits,[16] to receive wife's benefits upon reaching retirement age. Section 308(a) of the Social Security Amendment of 1965, 79 Stat. 375, as amended, 42 U.S.C. (and Supp. IV) 402(b) and (e), 416(d).[17]

This provision is reasonable in light of Congress' concern for those older women who, because they accepted the role as homemaker for much of their adult life, have not built up an earnings record sufficient to establish entitlement to old-age benefits. Congress believed it was appropriate to provide such women with what is, in essence, a retirement benefit, as a substitute for the normal primary insurance benefit a divorced wife might have obtained on her own account had she not been married.

This concern for the security of older divorced wives, of course, does not apply to divorced wives of

[16] If a divorced woman is entitled to old-age or disability benefits as a primary beneficiary in an amount that is one-half or more of the primary insurance amount of her former spouse, she is not entitled to wife's benefits. Section 202(b)(1)(D) of the Act, 42 U.S.C. (Supp. IV) 402(b)(1)(D); see note 2, *supra*.

[17] As with divorced widows with an entitled child in their care, Congress in 1972 eliminated the dependency requirement. See note 15, *supra*.

less than retirement age. It was reasonable for Congress to conclude that such younger divorced wives, such as appellee, have a better chance of obtaining work and thereby establishing eligibility for old-age benefits of their own.[18] They may also be more likely to remarry and have their economic needs taken care of by their new spouse. Thus, the current legislative distinction between younger and older divorced wives also is rational.

* * * * *

As can be seen, the history of the wife's and widow's benefits provisions is one of steadily expanding coverage. Each expansion of coverage has been responsive to specific and newly felt social needs. Younger divorced wives with entitled children in their care have simply not yet been identified by Congress as sufficiently in need to require special assistance.

We have been unable to find any instance in which Congress has considered and rejected a proposal to extend benefits to younger divorced wives in appellee's position. The legislative history therefore does not state the reasons such women have not been granted benefits. It is possible that there has been no specific, affirmative congressional reason for the denial of benefits: benefits have been "denied" in the past because

[18] Of course, if the divorced wife does not establish eligibility for primary insurance in an amount equal to or greater than one-half the primary insurance amount of her former spouse, she becomes eligible for wife's benefits at age 62. See pp. 25–26, *supra*. Appellee will be 62 in February 1977 (see App. 2).

Congress has been able to respond adequately to the most acute or visible situations of need in ways that did not entail the extension of benefits to appellee and her class.

It may be characteristic of cases such as this—where the issue is whether Congress, having extended benefits so far, has extended them far enough—that the legislative history will be silent as to why the benefits were not further extended to one or more other possible classes of beneficiaries. Indeed, in some instances the legislative history affords little or no explanation of why benefits were extended to a particular category of beneficiaries. Of necessity, therefore, the appropriate inquiry in such cases is whether grounds that may reasonably be considered to have been within the contemplation of Congress supported the extension of benefits to one group or groups but not to another. Since, as we have shown, grounds exist for the extension of benefits to wives and certain divorced wives that do not support a similar extension of benefits to younger divorced wives with entitled children in their care, Congress' failure to extend benefits to the latter class does not violate the requirements of due process.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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